No. 452

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 7228.

CHARLES A. McCULLOCH, Farmer-Debtor.
No. 505. In Bankruptcy.

CHARLES A. McCULLOCH, Appellant,

versus

WILBUR L. LOFTUS, - Appellee.

DECISION ENTERED JULY 2, 1940.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

CHARLES A. McCULLOCH,
Petitioner.

WESTERFIELD-GOETZ CO., INCORPORATED, LOUISVILLE, KY.

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 7228.

CHARLES A. MCCULLOCH, *Petitioner,*

v.

WILBUR L. LOFTUS.

To the Members of the United States Supreme Court:

The undersigned petitioner makes this verified plea to Your Honors, praying that he be granted the benefits of a writ of certiorari in the above-cited litigation, transferring the record in said cause from the United States Circuit Court of Appeals, Seventh Circuit, Chicago, Illinois, for review by the United States Supreme Court, alleging:

1. A constitutional question involved; and

2. Manifest and irreparable injustice done by decisions in lower courts as disclosed by statements of fact as follows, to-wit:

The decisions objected to make a distinction between large farmers and small farmers which deny to petitioner his rights under the Constitution of the United States.

Manifest and irreparable wrong and injury has been visited upon petitioner by permitting more than

two years to elapse, involving petitioner in great expense and material loss from accruing interest and penalizing taxes, including an appeal, No. 6500, to the United States Circuit Court of Appeals, Seventh Circuit, fully established by the record, and for emphasis recited herein as follows, to-wit:

Your petitioner believes that rulings entered in lower courts have been guided by the fact that important matters involved in the case at bar have never been before the Supreme Court which ought to be ruled upon by the court of last resort. (Rule 38, Par. 5, letter (b).)

To shorten petitioner's recital of facts believed to be important he prays the Court to consider a copy of a letter dated October 21, 1939, addressed by his attorney to Hon. William Lemke, M. C., as follows, to-wit:

"New Albany, Ind., October 21, 1939.

Hon. William Lemke, M. C.,
House Building,
Washington, D. C.

Re: In Bankruptcy.
Charles A. McCulloch,
Farmer Debtor.

Loftus vs: McCulloch. Petition raising question as to jurisdiction. Involving status of debtor as farmer.

"Dear Mr. Lemke:

"I gratefully recall correspondence with yourself, approximately two years ago, relative to

cause No. 505, above cited, and your valued aid in furnishing illuminating literature as to operation of the Frazier-Lemke Act of the Congress, but more particularly to your generous offer to be of assistance to my client, if needed, in the matter of an appeal which had been taken from a decision of the United States District Court for the Southern District of Indiana, New Albany Division, which had been entered in that court October 20, 1937, to the Circuit Court of Appeals, Seventh Circuit, Chicago, Illinois.

"I felt very thankful that in that proceeding it did not become necessary to invoke your assistance because while the question on appeal in our case was pending before the Circuit Court the United States Supreme Court handed down a decision in the case of Wright vs: Union Central Life Insurance Company, 304 U. S. 502, 58 S. Ct. 1025, disposing of the question at issue and the Circuit Court reversed our District Court in our case and ordered the same remanded for further proceedings.

"One of McCulloch's secured creditors was the New Albany National Bank, now in liquidation, and after the decision referred to the Receiver obtained from the Department in Washington authority to sell said loan and the same was sold and transferred to Wilbur L. Loftus, he being the highest bidder. This transaction occurred, towit, June 9, this year and shortly thereafter Loftus filed a petition in our District Court, attacking the status of McCulloch as a farmer within the purview of the Frazier-Lemke Act.

"The Loftus petition was referred by Judge Baltzell to Wilmer T. Fox of Jeffersonville, Indiana, as a Special Master, June 27, 1939, and directed said Fox to take testimony concerning the case and to report said testimony with his findings of fact and conclusions of law thereon to the Court.

"July 21, 1939, said Wilmer T. Fox as such Special Master took and heard the evidence given in behalf of said petitioning creditor and of said debtor and caused the same to be reported and embodied in a transcript thereof.

"September 8, 1939, said Special Master filed in the office of the Clerk of the United States District Court for the Southern District of Indiana, New Albany Division, his Master's report, finding for the petitioning creditor and expressing the opinion that McCulloch does not qualify as a farmer.

"Monday, October 16, 1939, Judge Baltzell approved the report of the Special Master in Chancery and confirmed the same. Verbal notice of appeal was given by me to Judge Baltzell and written notice under date of October 18, 1939, has been entered.

"Now, Mr. Lemke, I am taking the liberty of writing this rather full letter to you because I believe that the administration of the Frazier-Lemke Act in a broad and comprehensive manner is at issue, involving the status of the small farmer, and if you agree with me that the act in question was never intended to discriminate between the owner of a large farm and a farmer who owns, and operates, one, or more, small farms, I invite your active interest and co-operation in behalf of Mr. McCulloch.

"I recite some facts, believed to be pertinent, in order that your counsel, when furnished, shall be based upon such knowledge, and should you desire fuller information I shall be at your command and shall gladly supply the facts if within my power to do so.

"Mr. McCulloch is a sufferer from rheumatism, seriously affecting the sciatic nerves, and is at the present time confined to his bed. He is at no time active, cannot follow the plow or make a hand in wheat or hay harvest. He is generally able to assist in milking, feed the chickens, slop the hogs and hoe some in the garden.

"He is the owner in fee of a 14 acre tract of farming land, unimproved, which he rents to a share-cropper; a 33 acre tract of land, improved by a valuable dairy-barn, which he rents for dairying purposes for a cash rental; and shares with other heirs the ownership of an improved farm of 35 acres, occupied by sisters, from which he derives no income. He resides with his wife and two small sons on a 10 acre farm, owned by his wife, which furnishes the chief source of the living for himself and family.

"It is admitted that his urban holdings of real estate, partly improved property but chiefly unimproved and non-income producing, exceed in potential value his farm lands, but the principal part of his income is derived from his farming properties, and he actually resides upon and manages his wife's ten acre tract.

"At the hearing July 21, 1939, not one word of testimony that McCulloch is not a farmer was offered by plaintiff other than the testimony of the

debtor, whom they called as their first witness and who recited the foregoing facts, while we introduced 15 to 20 dirt farmers, many of them McCulloch's near neighbors and all of them persons of intelligence and probity, who testified that debtor's chief occupation has always been, and is now, farming. Attorneys for petitioner challenged all witnesses introduced by debtor on the ground that they did not qualify as experts, objection being noted, but each was allowed to testify, all were cross-examined by petitioner's attorneys, and in nearly every instance the cross-examination strengthened their testimony. We could easily have produced fifty witnesses to prove that McCulloch is a farmer but the Special Master impatiently objected that we were needlessly furnishing cumulative proof, though notwithstanding this o'erwhelming testimony he took the view of the counsel for petitioner that McCulloch is primarily a dealer in real estate and does not qualify as a farmer under the Frazier-Lemke Act, and Judge Baltzell confirmed this opinion. As a matter of fact neither the Special Master nor the Judge needed, or regarded, any proof submitted at this alleged hearing of the matter, both having determined this matter in their own minds before entering upon the proceedings, as clearly indicated by marked discourtesy to the debtor by the Special Master, which, seemingly, he sought to efface by special courtesy to myself. It is not in the record but when the Special Master, in person, delivered to me at my office a copy of his finding of facts and opinion, he commented that I should have sought to prove that McCulloch is a farmer by calling lawyers to testify as to that fact. By such

logic dentists would be the proper persons to call to prove that a man is a blacksmith; grocers to prove that a man is a huckster; and debutante and dowager socialites to prove that a mule was sired by a jack ass. An absurd system of logic.

"We stressed the United States Supreme Court's decision, written by Justice Cordozo, in the case of the Bank v. Beach wherein the Court used the words 'Beach is a farmer or he is nothing' and the conclusion naturally reached, and announced, therein completed the syllogism finding Beach to be a farmer. We proposed the syllogism 'McCulloch is a farmer or he is nothing. He certainly is something. Therefore he is a farmer.' Singularly enough, the attorneys for the petitioning creditor invoked the same case, citing it as coming within the purview of the Frazier-Lemke Act because of the extensive acreage involved.

"It is probably true that it will be hopeless for McCulloch to attempt to discharge his indebtedness by sale of the products of the soil, but his 33 acre tract, which, as stated, is now in use for dairy purposes, adjoins the city limits of the City of New Albany, and it does not appear unreasonable to hope that general conditions will improve so that a suburban subdivision can be developed which will take care of McCulloch's creditors within a reasonable time, as provided by the Act which has been invoked. He plans to pay all creditors, principal and interest, in full if allowed to proceed under the Frazier-Lemke Act. But if forced into usual bankruptcy, and his real estate holdings shall be offered for sale under the hammer, it is very doubtful if his property will cancel his in-

debtedness, leaving him penniless as, likewise, broken in health.

"I am not in possession of official rules of practice governing proceedings in inferior federal courts, approved by the United States Supreme Court, and effective in September, 1938, as I have only copies of '75th Congress, 3d Session—House Document No. 460' and '75th Congress, 3d Session—House Document No. 588,' which Senator Minton supplied to me, pertaining to said rules. From these documents I note that by 'Rule 72' provision is made for appeals from a District Court to the Supreme Court under certain conditions. One of these is where a constitutional question is involved, which I dare not assume to exist in this case. But another clause makes reference to the poverty of a litigant, which might apply to the case at bar and if appeal can be taken in the case at bar from the United States District Court, Southern District of Indiana, New Albany Division, to the United States Supreme Court such a proceeding would save costs and hasten the adjudication of this case.

"Do me the kindness to investigate this phase of the matter at bar and place me under deep obligations to yourself by having an official copy of the Rules of Practice governing procedure in the Federal Courts, approved a year ago last month, mailed to me. If any expense be connected with the mailing of such documents, advise me and I shall remit.

"If from a study of the foregoing it is your conclusion that the spirit of the Frazier-Lemke Act alone should control judicial proceedings in

its interpretation and that the letter of the law ought to be disregarded, and you believe an appeal in the McCulloch case would be hopeless, kindly frankly write to me by return mail that such is your conclusion and I shall communicate the same to my client for his future guidance.

"To aid you in reaching your conclusion, I enclose a copy of the entry made in our District Court October 16, 1939.

Yours sincerely,

(Signed) C. R. McBride."

In reply to the foregoing letter, Mr. Lemke expressed the belief that the case at bar is even stronger than the Beach case, counseled that it will be impractical to seek a transfer from the District Court to the Supreme Court and advised that appeal be entered to the Circuit Court of Appeals, which was done. Moreover, Mr. Lemke has generously offered to be of assistance, if needed, before the Supreme Court of the United States.

The ruling of the Special Master, approved by the District and Circuit Courts, that petitioner was not a farmer within the meaning of Section 75 (r) at the date, May 28, 1937, of filing thereunder, was an unjustifiable conclusion of law, arising from the testimony, undisputed, that at the date of filing this petitioner was living on a ten-acre farm, the title to which is vested in Estelle E. McCulloch, petitioner's wife, but petitioner was operating said farm and the dairy stock and poultry, which he owned, thereon and the income

therefrom, due to petitioner's labor and management, together with the value of the hay from the McCulloch-Embry tract, constituted the greater part of petitioner's income in 1937, the year of filing. Moreover, that ruling ignored the facts of petitioner's fee ownership of the 33-acre farm, used for dairying purposes, the unimproved 14-acre tract, used for farming purposes, and an undivided interest in the farm upon which he was reared. Petitioner admits that his farming activities in 1937 was somewhat curtailed from farming activities conducted in 1936, due to the fact that the 14-acre tract could not be farmed that year because of matters beyond petitioner's control as disclosed in Transcript, bottom of page 11 and on page 12.

Since the Special Master, in his conclusions of law in the initial proceedings in this cause, stressed the absence of Mrs. Estelle E. McCulloch, petitioner's wife, to appear and testify, as a most damaging omission, if deemed important, permissible and desired by this Court, said Estelle E. McCulloch will submit a deposition corroborating all material testimony as to petitioner's status furnished at the hearing before the Special Master by himself and his witnesses. Her absence from said hearing was not due to fear that her testimony on any point would be adverse to the farmer status of petitioner, but it was not believed that her testimony would be needed, or if furnished would be more convincing than that of disinterested neighbors. Besides, the appellee could have called Mrs. McCulloch as a witness if counsel for appellee believed her tes-

timony to be important and they did not do so, preferring, seemingly, to note her absence and to cite authorities and cases which give adverse weight to uncalled witnesses who were in a position to know the facts.

The Special Master's conclusion of law and of fact that because some of the personal property owned by petitioner was listed for taxation by petitioner's wife for a number of years, is an error because such listing was done with petitioner's full knowledge and consent in the presence of the deputy assessor, as shown by Transcript, page 64. The property was listed and appraised for taxation, the taxes were fully paid and no tax evasion was attempted. By an oversight, unintentional, and in petitioner's absence a few farming implements, loaned to neighbors, were omitted from the listings on a few occasions.

Your petitioner relies absolutely upon the decision of this Court in the cause entitled First National Bank and Trust Company v. Beach, 301 U. S. 435, for under the logic and conclusions recited therein this petitioner confidently reposes full faith in the righteousness of his cause. Stressing particularly the renting for dairy purposes of the 33-acre tract as fully disclosed by the testimony.

At this time your petitioner wishes to comment upon the fact that his omission to file objections to the rulings of the Special Master was based upon his confidence in the Beach case as being so controlling that the Special Master's conclusions appeared absurd and

petitioner felt confident the District Court would disregard them.

Your petitioner desires to state for the enlightenment of the Court that he has a potential income from the 33-acre farm which he rents to his brother and which is used for dairying purposes, which rental is due and unpaid. (Note Beach case, paragraph 3.)

Petitioner feels that he has been deeply wronged by the fact that more than two years were permitted to elapse after filing cause No. 505, during which period petitioner's farmer status was recognized, involving him in much expense, including an appeal, Cause No. 6500, before this appellee in Cause No. 7228 filed the petition challenging petitioner's farmer status. (See copies marked Exhibit "A" in files of No. 505 and No. 6500.)

From the decision of July 2, 1940, your petitioner quotes as follows, to-wit: "The proceeding is again before us on the debtor's appeal, and again the debtor did not appear at the hearing in this court, either in person or by attorney." From the foregoing quotation this petitioner infers that the failure of himself or his attorney to appear became a matter of vital importance, entering into the final action by the Court, adverse to petitioner's interests, and he begs permission to explain such absence on his part as due to lack of funds, and the absence of his attorney was due to advanced age, 83, and physical infirmities. Petitioner believed that his concise statement (Transcript, p. 90) excused such absence.

The Transcript of Record will disclose the lack of good faith of appellee in initiating the pending proceedings after submitting a proposal to secure title to a part of the real estate pledged for the debt, failing to effect such proposal and thereby seeking title to the remainder of the real estate described in the mortgage. By appellee's failure to carry out his proposal he denied petitioner's composition proposal because the debt to the New Albany National Bank, assignee, constituted a majority in value of petitioner's secured creditors, a well-nigh unanimous number of the creditors having consented to the proposed composition and consent, or cancellation, of the bank debt would complete it. My attorney had advised acceptance of appellee's proposition because the transfer of said real estate, under authority of the District Court, would cancel said mortgage debt and make petitioner's composition and extension proposal operative. (See Transcript, Exhibit "F," page 93.) Thereby obstructing justice.

Complying with paragraph 1, Rule 38, Revised Rules of the Supreme Court, petitioner files herewith printed copy of Transcript of Record, and authenticated copy of the decision entered by the Circuit Court of Appeals July 2, 1940, and stands ready to comply with commands of this Court to the extent of his financial ability; since on July 29, 1940, appellee filed in the Floyd Circuit Court a petition for appointment of a receiver to collect the rent from the real estate involved in this litigation, thereby curtailing petitioner's income from rental of a cottage, which was excluded by the

proposal made by the creditor and accepted by petitioner and wife, as disclosed by Exhibit "F" heretofore recited. Said petition for receiver was heard August 1, 1940, and granted.

WHEREFORE, Petitioner prays that he be granted the benefits of a Writ of Certiorari and for all proper relief.

CHARLES A. McCULLOCH,
Petitioner.

Subscribed and sworn to before me this 15th day of August, A. D. 1940.

CHARLES R. McBRIDE,
Notary Public.

My Commission expires May 8, 1942.

[SEAL]